

Testimony of

The Honorable Orrin Hatch

February 7, 2002

This is the second hearing that this Committee has convened on the nomination of Charles Pickering, Sr., to be a judge on the United States Court of Appeals for the Fifth Circuit. I am aware of some of the allegations that have been levied against Judge Pickering, and I am certainly interested in hearing his response, as I feel sure that we will during the course of this hearing. I am, however, troubled by what appears to be a national agenda by a coalition of left-wing interest groups who have spent months hunting around for an excuse to use the Pickering nomination as a way to attempt to paint this Administration's nominees as extremist. Though I am concerned by the underlying agenda, I believe they have picked the wrong nominee for that.

There appears to be a real disconnect here. We have received nearly 100 letters of support for Judge Pickering's nomination to the Fifth Circuit. They include letters from 18 current or former Presidents of the Mississippi State Bar. We have received letters from 27 members of the African-American community, including 4 present or former NAACP officials; 10 public officials; and 4 pastors. Eighteen self-professed Democrats have sent letters, including 2 former Governors and 3 former Lieutenant Governors. And we have received letters from 57 practicing attorneys, including 5 civil rights attorneys, 13 criminal defense attorneys, 10 plaintiff's lawyers, and 14 civil defense lawyers.

Some of the Mississippians who have written us have made the trip here to DC to show their support for Judge Pickering. One such supporter is Charles Evers, brother of slain civil rights leader Medgar Evers. In an editorial that appeared in today's Wall Street Journal, Mr. Evers documented Judge Pickering's commitment to civil rights over the past four decades, which has included testifying against the Imperial Wizard of the Ku Klux Klan in the 1960s; hiring the first black political staffer in the history of the Mississippi Republican Party in the 1970s; representing an African-American man accused of robbing at knife point a sixteen year old white woman in the 1980s; and leading the charge to establish the Institute of Racial Reconciliation at the University of Mississippi in the 1990s.

Mr. Evers explained his reasons for coming forward in support of Judge Pickering as follows: "In recent days, I have been saddened and appalled to read many of the allegations which have been put forth about Judge . . . Pickering These allegations are mostly made by groups with a Washington, D.C., address and a political agenda, not by anyone with real knowledge of Judge Pickering's long and distinguished record on civil rights. As someone who knows Judge Pickering and is familiar with his commitment on matters of race, I could not sit by and watch these groups' attempts to destroy a good man. Let me tell you about the Charles Pickering many of us in Mississippi have known for well over 30 years."

Others who could not be here today nevertheless wrote in ardent support of Judge Pickering. For example, Jack Dunbar, former President of the Mississippi Bar, wrote, "I am a Democrat and

would not want you to confirm any person to the federal courts of this nation who I felt was gender or racially biased. I have never known Judge Pickering to be a person or judge that was anything other than fair and impartial in his conduct toward women or minorities." William Winter, former Democratic Governor of Mississippi, wrote about Judge Pickering, "While he and I have not always been in agreement on certain public issues, I know that he is a man of reason and sound judgment. He is certainly no right-wing ideologue. He will bring a fair, open and perceptive mind to the consideration of all issues before the court.... He has been one of this state's most dedicated and effective voices for breaking down racial barriers." And Shane Langston, President of the Mississippi Trial Lawyers Association, wrote of Judge Pickering, "We know that he applies the law fairly and equally with regard to economic status, party affiliation, race, sex or religion.... Many members of the MTLA are African-Americans. We represent tens of thousands of African-Americans. We prosecute more race discrimination cases and claims of civil rights violations than any other legal association in the State of Mississippi. Members of our association and I represented the State Conference of the NAACP in a historic challenge to the 'Mississippi State Flag' regarding its divisive Confederate battle symbol. Our organization would never support a judicial candidate with a record of hostility or unfairness toward litigants claiming civil rights violations."

These Mississippians, who know Judge Pickering best, urge his confirmation. Those fighting Judge Pickering's nomination, in contrast, seem to consist primarily of a host of Washington lobbyists representing left-wing special interest groups whose main goal is to fight the Pickering nomination in an organized attempt to change the ground rules and impose their political litmus test for all of President Bush's judicial nominees. After an eight-year hiatus, these groups are back on the scene, ready to implement an apparent vicious strategy of Borking any judicial nominee who happens to disagree with their view of how the world should be. I really like the open-mindedness of these groups to views different from theirs.

An article in Monday's Legal Times provides a glimpse of what is going on behind the scenes of this confirmation hearing. The article reported, "As a young lawyer in Jones County, Miss., in the 1960s, Charles Pickering Sr. helped put Klansmen in jail. In the early 1990s, when preservationists and black activists clashed over a 'colored only' sign in a county courthouse, Pickering helped craft a compromise that the black community applauded. And as a federal trial judge, Pickering has tried to keep young African-Americans out of the criminal justice system, convening a group of local civic leaders to try to solve the problem. When the Senate Judiciary Committee meets Feb. 7 to consider Pickering's nomination to the U.S. Court of Appeals for the 5th Circuit, his liberal opponents won't be focusing on these aspects of the nominee's record. Liberal activists have combed through the decisions that Pickering has written in 11 years as a U.S. district judge in Hattiesburg, Miss., and have concluded that Pickering's confirmation 'poses a grave danger to our rights and liberties.' But a Legal Times analysis of Pickering's important rulings, as well as interviews with community leaders in his home state, offers an alternate view to the liberals' conclusions that Pickering is racially insensitive and indifferent to constitutional rights."

The article continued, "[A] look at the 64-year-old Pickering's record shows that although he has often ruled against civil rights claims, the facts of the cases have often tilted strongly against the

litigants claiming discrimination. And although in some voting rights cases he has doubted the correctness of relevant Supreme Court decisions, he has followed the law in making his rulings."

It is against this backdrop that we must examine the allegations we have heard and evaluate their credibility. I am concerned about the tenor and tone of the attacks that intolerant left-wing special interest groups have launched against Judge Pickering because they indicate to me a broader agenda at work here. I see these attacks as part of an organized campaign by the usual suspects to "change the ground rules" for the confirmation of federal judges. This is precisely what Professors Laurence Tribe and Cass Sunstein and activist Marcia Greenberger advocated to 42 Democratic Senators who attended a retreat last year in Pennsylvania as reported by the New York Times. The goal of that retreat was to plot a way to hinder confirmation of President Bush's judicial nominees. The conclusion they reached, according to someone in attendance who was quoted by the Times, was "for the Senate to change the ground rules."

Today's hearing is the culmination of nearly a year of effort to change the ground rules by injecting a political litmus test into the confirmation process. We have even had hearings on injecting political ideology into the confirmation process. Even Lloyd Cutler, former President Clinton's White House Counsel, thought this strategy was misguided. Of course, Professors Tribe and Sunstein, and Ms. Greenberger, who were invited to testify at the first of these hearings by my Democratic colleagues, all testified that injecting politics into the confirmation process is the course the Senate should take.

To further put this hearing in the appropriate context, I would like to make an additional observation about how very easy it is to make a political statement in Washington, DC, in 2002 before a friendly crowd that wants to hear it and, indeed, demands to hear it, given their political muscle. It is quite another thing to testify against the Imperial Wizard of the Ku Klux Klan in Mississippi in 1967, as Charles Pickering courageously did despite great risk to himself and his family. Although the physical safety of Judge Pickering and his family remained intact, his political career was not so lucky: He was defeated in his next election after testifying against the KKK. Years later, the former Imperial Wizard against whom he testified claimed credit for defeating Judge Pickering's bid for the U.S. Senate in 1976 and for state attorney general in 1979. Any Washington interest groups who question Judge Pickering's commitment to civil rights would do well to remember this.

On a separate matter, I would like to note that today's hearing seems to have been orchestrated from the start. President Bush nominated Judge Pickering for the Fifth Circuit on May 25 of last year. For nearly five months, not a single person that I'm aware of raised a question with Judge Pickering about obtaining copies of any of his unpublished opinions. Then, a mere two days before what was to become his first confirmation hearing, Judge Pickering received an oral request from the Committee's Democratic staff to provide a list of all cases in which he had rendered an unpublished opinion. The request covered more than 900 cases, and was impossible to fulfill on such short notice. The request was then revised to include only those unpublished opinions in four categories of cases: Title VII, the Americans with Disabilities Act, ADEA, and the Equal Pay Act. Judge Pickering complied with this request on the following day.

At his October 18 hearing, my Democratic colleagues requested that Judge Pickering provide the Committee with his unpublished opinions reversed by the Fifth Circuit - a mere 21 out of more

than an estimated four thousand-plus cases that Judge Pickering has decided during his tenure on the federal bench. My friends across the aisle also agreed to limit their request for Judge Pickering's unpublished opinions to specific categories of cases in order to facilitate their production. Accordingly, they asked for those cases pertaining to Voting Rights Act, Fair Housing Act, labor relations, Section 1983, equal protection, habeas corpus, PLRA, and AEDPA cases. Incidentally, Judge Pickering responded in three separate letters the following day. Nevertheless, my Democratic colleagues announced their intention at the October hearing to schedule a second hearing before ever having seen these additional unpublished opinions.

Within a week of the hearing, my Democratic colleagues requested more unpublished opinions in the categories of VAWA, Fourth Amendment, and Eleventh Amendment cases. Judge Pickering responded within three days to this request.

Apparently dissatisfied with what they found - or did not find - in the opinions that Judge Pickering produced, and contrary to their original representation that they would limit their request to specific categories of cases, my colleagues then asked Judge Pickering for all of his available unpublished opinions, as well as the captions and names of defendants in all criminal cases to come before him. This request came nearly one month after his hearing. Judge Pickering responded by express mail on the same day that he received this request. On December 21, Chairman Leahy inquired further about additional unpublished opinions. He noted that the Committee had received only "approximately 600 opinions," and asked for an accounting of the location of Judge Pickering's remaining unpublished opinions. He also questioned Judge Pickering's effort to obtain copies of his unpublished opinions. Judge Pickering responded, and has since been able to locate additional unpublished opinions which he promptly turned over to the Committee.

As recently as January 31, Chairman Leahy insisted that Judge Pickering produce not only his unpublished opinions of which he is aware, but also "potentially hundreds more of [his] unpublished opinions . . . in paper archives" of which Judge Pickering is not aware. I cannot recall another nominee who has been subjected to a document production of this scope. If this continues for future nominees, we will have to start filing environmental impact statements along with such requests. Again, I don't take our role to thoroughly examine the qualifications of judicial nominees lightly. But in all seriousness, I have grave concerns about the appearance of a fishing expedition that this request has created. I sincerely hope that this is not the beginning of a pattern of what some may view as harassment for future nominees.

I would also like to note that holding a second hearing solely for the purpose of examining the record of a single nominee is an extraordinary measure. During my six-year tenure as Chairman of this Committee during the Clinton Administration, we held second hearings for 9 nominees who, for various reasons, faced substantial opposition. In all but one instance, we considered the nominees facing a second hearing along with a slate of other nominees who were making their debut before the Committee. Likewise, the second hearing for all but one of these nominees took place in a new Congress, which allowed any new Members to evaluate the nominee first-hand. I might note that all but one of the nominees who endured second hearings before this Committee were ultimately confirmed. The nomination of the sole individual who was not confirmed was withdrawn. So, the very fact that we are here today considering only the nomination of Judge Pickering in the same Congress is an extraordinary matter.

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